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No. 92-00018

In The

Supreme Court of the United States

October Term, 1992

UNITED TECHNOLOGIES INTERNATIONAL, INC., P & W COMMERCIAL ENGINE BUSINESS,

Petitioner,

vs.

MALEV HUNGARIAN AIRLINES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT C. BATA
Counsel of Record
ELIZABETH A. MULLINS
KENNETH PASQUALE
Stroock & Stroock &Lavan
7 Hanover Square
New York, New York 10004
(212) 806-5400

BARRY H. GARFINKEL
MARCO E. SCHNABL
Skadden Arps Slate Meagher & Flom
919 Third Avenue
New York, New York 10022
(212) 735-3000

Attorneys for Respondent

QUESTION PRESENTED

Did the Court of Appeals correctly hold that the district court abused its discretion in denying Malev's application pursuant to 28 U.S.C. § 1782 (1988), which authorizes "any interested person" to seek assistance of a district court in obtaining discovery of a person residing or found in the United States for use in proceedings before a foreign tribunal, on the ground that the district court should not have relied on factors neither mentioned in the statute nor implied by its legislative history; namely, that Malev should have first presented its request for discovery to the foreign court, and that granting the application would entail unspecified "reciprocal discovery problems?"

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No. 92-00018

In the

Supreme Court of the United States

October Term, 1992

UNITED TECHNOLOGIES INTERNATIONAL, INC., P & W COMMERCIAL ENGINE BUSINESS,

Petitioner,

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MALEV HUNGARIAN AIRLINES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Malev Hungarian Airlines[1] ("Malev") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari of United Technologies International, Inc., P & W Commercial Engine Business ("Pratt"), dated July 1, 1992.

1. The following information is provided pursuant to Rule 29.1 of this Court: Malev Hungarian Airlines is a foreign corporation wholly owned by the Hungarian state.

STATUTE INVOLVED

This case applies 28 U.S.C. § 1782 (1988), which provides:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the place and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give h is testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

COUNTERSTATEMENT OF THE CASE

A. Malev's § 1782 Request

On July 23, 1992, Pratt commenced an action against Malev in the Municipal Court of Budapest, Hungary (the "Hungarian Litigation"). In the Hungarian Litigation, Pratt appears to seek specific performance of an alleged contract for the sale of jet airplane engines worth tens of millions of dollars. C.A. App. A-18-46.[2] Pratt alleges in the Hungarian Litigation that Malev entered into a contract when it sent a letter responding to one of a series of Pratt's proposals to supply Malev with engines for wide-body aircraft, to be purchased by Malev in the future.

Malev timely filed its response to the complaint in the Hungarian Litigation, and thereafter commenced this proceeding pursuant to 28 U.S.C. § 1782 (1988) in the United States District Court for the District of Connecticut, where Pratt's principal place of business is located, to obtain certain depositions and documents of Pratt.[3] C.A. App. A-118, 131. Pursuant to 28 U.S.C. § 1782

2. As in Pratt's petition, "C.A. App." refers to the Appendix on Appeal in the United States Court of Appeals.

3. Malev's document request was carefully tailored to the allegations of the complaint in the Hungarian Litigation and sought those documents necessary to defend against Pratt's claims. Besides seeking documents relating to the negotiations between Malev and Pratt, Malev also sought documents related to Pratt's efforts to market its engines to airlines in other parts of Eastern Europe — efforts which Pratt itself, in its complaint, described as related to and affected by its dealings with Malev. C.A. App. A-21. Similarly, Malev's deposition notice sought the testimony of Connecticut based Pratt employees with knowledge of the negotiations with Malev.

(1988), "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . upon the application of any interested person." 28 U.S.C. § 1782(a).

At a hearing on September 20, 1991 in the Hungarian Litigation, Malev informed the Hungarian court of its pending § 1782 application. The Hungarian court expressly overruled Pratt's objections to Malev's decision to seek discovery in the United States, noting that the American discovery proceeding "— as is the case with Hungarian discovery mechanisms — has the objective of discovering the parties' positions and the marshaling of evidence." C.A. App. A-206. Therefore, the Hungarian court held, "[t]he means used to obtain disclosure and to marshal evidence by the party seeking to offer evidence at trial is exclusively up to that party." C.A. App. A-206-207.

Having failed in its attempt to persuade the Hungarian court to issue an order disapproving of Malev's effort to obtain discovery of Pratt under § 1782, Pratt sought to defeat Malev's § 1782 application in the Connecticut court. C.A. App. A-146, 171. When Pratt claimed that it would be "unfair" to subject Pratt to discovery in the United States while discovery of Malev proceeded in Hungary, Malev repeatedly offered to be bound by the same discovery rules as Pratt. C.A. App. A-201, A-267, A-272-77, A-309-11. Pratt has never availed itself of Malev's offer and never propounded a single discovery request.

B. The District Court's Opinion

The district court (Clarie, J.[4]) issued its opinion on September 30, 1991, denying Malev's application. The court cited two grounds for its decision. First, the court concluded that Malev's

4. Judge Clarie recently retired from the bench.

request was "premature and unnecessary," because "Malev has never made a formal discovery request upon Pratt & Whitney before the Hungarian court." C.A. App. A-320. Second, the district court opined, without elaboration, that its "involvement would unnecessarily complicate the case and bring with it significant reciprocal discovery problems." It concluded that, "[a]bsent a request from the Hungarian court to become involved in the oversight of discovery, Malev's request is denied." *Id.*

C. The Court of Appeals' Opinion

By decision dated May 5, 1992, the Court of Appeals for the Second Circuit reversed the district court's order on the ground that the court had relied upon improper factors in denying Malev's § 1782 application, and remanded the matter for further proceedings in accordance with its decision. Pet. App. 3a.[5] After a careful review of the legislative history, the Court of Appeals held that it was an abuse of discretion for the district court to have denied the request for discovery simply because it was not first made in the Hungarian Litigation and on the ground that there might be "reciprocal discovery problems." Pet. App. 6a, 8a-10a. The Court of Appeals explained that the purpose of § 1782 is to "provide efficient means of assistance in our federal courts for litigants involved in international litigation and ... prompt foreign courts to follow our generous example and provide similar assistance to our court systems." Pet. App. 4a-5a. The Court of Appeals found that the district court's opinion failed to advance these "twin aims" of the statute. Pet. App. 6a.

The Court of Appeals first held that § 1782, its legislative history and the cases interpreting it do not support a "quasi-exhaustion requirement" which would obligate Malev to seek

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5. As in Pratt's petition, "Pet. App." refers to the appendix filed with the Petition for a Writ of Certiorari.

disclosure first in the Hungarian Litigation. Pet. App. 6a.

> To the contrary, the plain language of 28 U.S.C. § 1782(a) states that "upon the application of any interested person," the district court where the person from whom discovery is sought resides may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.

Pet. App. 6a-7a. The appellate court found that such a quasi-exhaustion requirement would defeat the purposes of the statute, by undermining the policies of improving procedures for assistance in foreign proceedings and of prompting foreign courts to follow our "generous example." Pet. App. 7a. The decision also noted that it was unprecedented to deny a § 1782 application merely because the foreign litigant had not first sought the discovery in the foreign proceeding. *Id.*

The Court of Appeals also held that it was improper for the district court to deny Malev's application solely because the Hungarian court had not requested the district court's assistance in overseeing discovery. The Court of Appeals noted that, pursuant to the statute, a request for discovery under § 1782 can be made "*upon the application of any interested person.*" Pet. App. 8a (emphasis in original). By denying Malev's application on the further ground that the Hungarian court had not requested its assistance, "the district court read this provision out of the statute." Pet. App. 8a-9a.

The Court of Appeals further held that the district court had erred when it rejected Malev's request because of the court's concerns about "reciprocal discovery problems." Noting that it

was "not entirely sure what the district court meant when it invoked the phrase 'reciprocal discovery problems,'" the Court of Appeals inferred that the district court was referring to supervising Pratt's discovery of Malev, pursuant to Malev's offer to submit to discovery in the United States. Pet. App. 9a. In any event, the Court of Appeals held, the district court was "mistaken to the extent it believed Malev's request would *necessarily* require the district court to supervise discovery by Pratt & Whitney from Malev. . . ." Pet. App. 10a (emphasis in original).

The Court of Appeals remanded for further proceedings. The Court of Appeals suggested that the district court could minimize any supervisory burdens while acting within § 1782 by utilizing Fed. R. Civ. P. 26 to "lessen significantly the burden of handling this discovery." Pet. App.10a. For example, it suggested that, pursuant to Rule 26, the district court could require Malev to submit a discovery plan to the Hungarian court. Pet. App. 11a.[6]

In a dissenting opinion, Judge Feinberg argued that § 1782 should be narrowly construed, not to apply where both of the litigants are subject to the jurisdiction of the foreign court. Pet. App. 12a. While acknowledging that "[q]uasi exhaustion may not be written into the statute . . . ," Judge Feinberg argued that the principle was nevertheless appropriate, and that, therefore, the district court had not abused its discretion. Pet. App. 18a. Moreover, the dissent implied that "need" was a required showing under § 1782, despite the absence of such a requirement in the statute, its legislative history, or the applicable case law. Finally, while conceding that the majority was correct, that "[o]f course, the statute does not *require* reciprocal discovery . . .," and without

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6. Indeed, as Malev advised the district court (Pet. App. 26a-27a), Malev did just that by letter dated June 29, 1992.

acknowledging that Malev had offered to provide Pratt with equal discovery rights, the dissent nonetheless insisted that "fairness" suggests that Malev should not be afforded the right to discovery under § 1782 while Pratt is purportedly limited to the discovery permitted by the foreign system. Pet. App. 18a-19a (emphasis in original).

D. Other Proceedings

Following issuance of the Court of Appeals' decision and order, Pratt filed a petition for rehearing containing a suggestion for rehearing *en banc*. By order dated June 26, 1992, the Court of Appeals denied the petition for rehearing and refused to rehear the case *en banc*. Resp. App. A1.[7]

Additionally, while Malev's appeal to the Court of Appeals was pending, the Hungarian court issued a partial judgment which discussed various aspects on the merits of Pratt's lawsuit, and included certain purported findings of fact, made without the benefit of any evidence which Malev may have adduced as a result of the discovery it sought pursuant to § 1782. The translation of the opinion, and the opinion's import, are disputed by the parties, and, in any event, the opinion is not before this Court.[8] Malev has lodged an interlocutory appeal of the Hungarian court's partial judgment, and its purported findings of fact, in the Hungarian Supreme Court, which has the power to engage in a *de novo* review of the lower court's opinion and may consider evidence not submitted to the court below.[9] *See* Petition at 9, n. 6. Accordingly,

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7. "Resp. App." refers to the appendix filed with this Brief in Opposition.

8. Although Pratt cites to the Hungarian court's opinion, it is not a part of the Appendix before the Court of Appeals, nor Pratt's appendix to its Petition. Petition at 8-9. ("Petition" refers to Pratt's Petition for a Writ of Certiorari.)

9. The Hungarian Supreme Court will hear arguments on Malev's appeal on September 25, 1992.

the discovery which Malev seeks in its § 1782 application is of vital importance, not only in connection with the issues remaining before the Hungarian trial court, but also in connection with Malev's appeal to the Hungarian Supreme Court.

SUMMARY OF ARGUMENT

There is no reason for this Court to grant Pratt's Petition for a Writ of Certiorari. The decision of the Court of Appeals does not conflict with, and indeed, is in accord with, the decisions of other courts of appeals which have considered § 1782. Nor does this case present any significant legal issue which would justify granting a writ of certiorari. Sup. Ct. R. 10.

The Court of Appeals' decision is entirely consistent with the purposes of the statute and other decisions which have interpreted § 1782. Contrary to Pratt's contention, a § 1782 applicant is not required to demonstrate "need" for the discovery sought. The "twin aims" of the statute — to provide efficient and generous assistance to participants in international litigation and by example to encourage foreign countries to provide similar means of assistance — are not advanced by imposing a requirement of "need" fashioned by the district court. Further, these twin aims are promoted by the Court of Appeals' decision. That decision rejects the additional burdens which would be placed upon international litigants by the district court's decision and so, by "generous example," encourages foreign jurisdictions to promote the principle of international cooperation embodied in § 1782. Pet. App. 7a.

Nor does the Court of Appeals' decision conflict with decisions of other circuits. Although Pratt argues that the decisions in *John Deere, Ltd. v. Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985), and *Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir. 1988), cannot be "reconciled" with the Second Circuit's opinion, no real conflict

exists. The decisions of the Third and Eleventh Circuits deal principally with the issue of whether the discoverability of the requested information in a foreign court should be a factor informing a district court's decision under § 1782. In light of the Hungarian court's rulings that the parties were free to marshal evidence by any means of their choosing, the Court of Appeals had no need or occasion to consider this issue. Therefore, there is no question that this decision does not conflict with those cited by Pratt. Moreover, under no interpretation may the Court of Appeals' decision be considered violative of principles of international comity. To the contrary, because the decision ensures that a United States court will not unnecessarily be required to interpret foreign law, it promotes such principles.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED BECAUSE THIS CASE DOES NOT PRESENT SIGNIFICANT LEGAL ISSUES OR OTHER SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

Pratt contends that the Court of Appeals' decision "conflicts with the text and evident purpose of" § 1782 in permitting assistance by United States courts to foreign litigants when such assistance is not, according to Pratt, "necessary, equitable, efficient and consistent with notions of international comity." Petition at 10. Pratt deliberately misconstrues the Court of Appeals' decision. Resting its decision upon notions of international comity entirely consistent with the terms and purposes of the statute, the Court of Appeals properly rejected the proposition that a United States court, when considering an application made pursuant to § 1782, should attempt to determine the "need" for the requested discovery under foreign law. Thus, Pratt's theoretical discussion of policies which are not implicated by the facts of this case, or by the Court of Appeals' decision, fails to present issues worthy of an exercise of this Court's discretion.

A. Review By This Court Would Be Premature

Pratt's Petition does not raise any substantive issues which need be addressed by the Court at this time. Pratt's primary contentions — that the discovery is not necessary and that it is unfair for Malev to be afforded United States discovery of Pratt while Pratt is left to the Hungarian court's procedures — have either already been addressed by Malev's commitment to engage in reciprocal discovery or may be addressed on remand to the district court. With regard to Pratt's concern about possible

unfairness, it is undisputed that Malev has agreed to engage in reciprocal discovery in the United States. C.A. App. A-267, A-272-77, A-309-11. Therefore, while the issue of reciprocal discovery under § 1782 may be an interesting academic question, it is simply not presented on these facts. In any event, as the Court of Appeals recognized, the availability of reciprocal discovery is neither a requirement for granting, nor even a factor to be considered on, an application under § 1782. *See infra* at 15-17.

Since the district court on remand may address Pratt's concerns — as, indeed, the Court of Appeals pointed out (Pet. App. 11a) — no practical purpose would be served by this Court's review of this case at the present time. Such review would therefore be premature. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1987) (denying certiorari "because the Court of Appeals remanded the case [and thus] it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision"); *American Constr. Co. v. Jacksonville, T & K.W.R. Co.*, 148 U.S. 372, 384 (1893) ("this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause").[10]

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10. Equally premature is Pratt's contrived concern about the effects of the Court of Appeals' decision on international arbitrations. When (and if) a § 1782 application arises in that context, United States courts will be altogether competent to apply the statute with due deference to the needs of international arbitrations. *Cf. Burton v. Bush*, 614 F.2d 389, 390-91 (4th Cir. 1980)(no discovery allowed in arbitral proceedings under the Federal Rules of Civil Procedure); *Mississippi Power Co. v. Peabody Coal Co.*, 69 F.R.D. 558, 566-67 (S.D. Miss. 1976)(same; citing authorities).

B. "Need" Is Not An Appropriate Factor Under § 1782

Nowhere in the legislative history of § 1782 or in the cases interpreting the statute is "need" set forth as a factor to be considered in determining an application for discovery by a foreign litigant or other interested person. Indeed, a requirement that an applicant show need to obtain § 1782 assistance would defeat the liberal policies so clearly reflected in the legislative history. Section 1782 is designed to encourage United States courts to assist in foreign proceedings, in the hope that other nations will be inspired to assist United States courts and litigants. *In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 690 (D.C. Cir. 1989) (*"Crown Prosecution"*); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1152-54 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989) (*"Trinidad"*); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 135 (3d Cir. 1985); S. Rep. No. 1580, 88th Cong., 2d Sess., *reprinted* in 1964 U.S.C.C.A.N. 3782, 3783, 3788. As "the leading commentary" observes, "[t]he basic rule should be that assistance is rendered unless important considerations affecting concrete and vital American interests require its refusal." *Crown Prosecution*, 870 F.2d at 690, *citing* Smit, *International Litigation Under The United States Code*, 65 Colum. L. Rev. 1015, 1029, n. 87 (1965).

Pratt would impose a requirement that the party seeking discovery demonstrate that the information sought in the United States proceeding was "necessary and appropriate under the rules of the foreign forum," to promote "comity objectives." Petition at 18. Not only would such a requirement violate the very principles § 1782 was adopted to advance, but compelling a United States court to interpret the "need" for certain evidence under foreign law would violate, not promote, such comity objectives. *See John Deere Ltd.* at 136 ("To require that a district court undertake a more extensive inquiry into the laws of the foreign jurisdiction [beyond

mere discoverability] would seem to exceed the proper scope of section 1782"); *In re Request for Judicial Assistance from the Seoul Dist., Criminal Court, Seoul, Korea,* 555 F.2d 720, 723 (9th Cir. 1977) (federal courts should not feel obliged to interpret foreign law in responding to § 1782 requests); *In re Asta Medica, S.A.*, No. 91328-P-H, 1992 WL 119080 (D. Me. May 22, 1992) (neither § 1782, its legislative history, or academic commentary requires United States courts to be burdened with analyzing foreign law, including issue of discoverability; application under § 1782 granted); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago,* 117 F.R.D. 177, 178 (S.D. Fla. 1987) ("Our courts should not become entangled in interpreting foreign law when deciding whether to grant requests for judicial assistance [under § 1782]. . . . Foreign tribunals are far more competent to decide issues of their own making than are United States courts").[11]

Underlying Pratt's argument is its contention that Malev should have sought the discovery in Hungary before applying to the district court. However, as the Court of Appeals correctly held, § 1782 does not contain a "quasi-exhaustion requirement." Pet. App. 6a. In fact, no court interpreting § 1782 has ever held that a litigant was required first to seek its discovery in the foreign court — nor has any court indicated that the litigant had first sought discovery in the foreign forum. For example, in *John Deere, Ltd.*, 754 F.2d 132, Deere was granted discovery pursuant to § 1782 despite the apparent absence of any attempt to first obtain the same information through Canadian procedures.[12] Further, as the Court

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11. Pratt distorts the academic commentary it offers at pages 11-12 of its Petition. Neither supports the view that "need" is a requirement of § 1782. Rather, they observe self-evidently that § 1782 is "needed" only where voluntary cooperation — an option Pratt has obviously rejected — is unavailable.

12. Subsequent to the district court's denial of Deere's § 1782 application, Deere requested discovery in the Canadian litigation. *Id.* at 137.

of Appeals recognized, requiring applicants first to seek discovery in the foreign jurisdiction would "undermine the policy of improving procedures for assistance to foreign and international tribunals by imposing an additional burden on persons seeking assistance from our federal courts for matters relating to international litigation." Pet. App. 7a.

C. Reciprocity Is Not Required By § 1782

Pratt also argues that discovery must be "fair or equitable" under § 1782. Petition at 13. One-sided discovery, according to Pratt, is not fair, and thus should not be condoned. *Id.* at 20. This argument totally ignores the "twin aims" of § 1782 — to assist participants in international proceedings and to encourage foreign countries by example.[13]

"It is not unfair to say that Public Law 88-169 [enacting present Section 1782] is a one-way street. It grants wide assistance to others, but demands *nothing* in return. It was deliberately drawn this way . . . ." Amram, *The Proposed International Convention on the Service of Documents Abroad,* 51 A.B.A.J. 650, 651 (1965)(emphasis in original). "[T]he United States decided over a decade ago to act unilaterally, without requiring reciprocity or even comity." Degnan, *Obtaining Witnesses and Documents (or Things),* 108 F.R.D. 223, 232 (1986). The undeniable purpose of § 1782 was to stimulate foreign reciprocation by generous example, not to demand "reciprocity" as a precondition to assistance. *See* 1964 U.S.C.C.A.N. 3794; Smit, *supra,* 65 Colum. L. Rev. at 1018-1019. Thus, "it is inappropriate for U.S. courts to consider the existence of reciprocity in the calculus of determining whether to honor requests for information based on section 1782." Comment, *Much Ado About 1782: A Look at Recent Problems with*

13. As set forth *supra* at 4, Malev's offer to submit to discovery in the U.S. court — despite the lack of any request by Pratt — renders Pratt's argument on this point irrelevant.

Discovery in the United States for Use in Foreign Litigation Under 28 U.S.C. § 1782, 20 Inter-Am. L. Rev. 429, 452 (1989). In *John Deere*, the Third Circuit Court of Appeals found that

> [t]he liberal intent to provide judicial assistance whether or not reciprocity exists has been acknowledged as a primary statutory goal since section 1782's inception . . .
>
> . . . [A]lthough the district court was not prohibited from giving the absence of reciprocity some consideration in the exercise of its discretionary power, its decision should not have been predicated upon a finding of reciprocity.

754 F.2d at 135.

Pratt's reliance on *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987), Petition at 14-15, is entirely misplaced. *Société Nationale* involved a conflict between the Hague Convention on the Taking of Evidence and the Federal Rules of Civil Procedure — a comparison irrelevant to the reciprocity issue under § 1782 raised by Pratt. Moreover, that case, far from supporting Pratt's argument, actually refutes it in its discussion of both § 1782 and the Hague Convention. Thus, in *Société Nationale*, this Court described § 1782 as an amendment "to grant foreign litigants, *without any requirement of reciprocity*, special assistance in obtaining evidence in the United States." *Id.* at 529-30 (emphasis added). The Hague convention, by contrast, the Court stated, was designed to "improve mutual judicial cooperation." *Id.* at 534 (emphasis added).

Finally, Pratt's argument that one-sided discovery conflicts with the legislative intent of § 1782 rings hollow in light of the

numerous cases which have interpreted the statute as authorizing assistance with respect to foreign criminal matters despite the obvious fact that no discovery in the United States of foreign prosecutors was expected or offered. *See, e.g., Crown Prosecution,* 870 F.2d 686; *Trinidad,* 848 F.2d 1151; *In re Letters Rogatory from Tokyo Dist., Tokyo, Japan,* 539 F.2d 1216 (9th Cir. 1976); *In re Letter Rogatory from Justice Court, Dist. of Montreal, Canada,* 523 F.2d 562 (6th Cir. 1975).[14]

D. The Court of Appeals' Decision Will Not Burden the Courts or Penalize Litigants

Although Pratt repeatedly argues that the Court of Appeals' decision "transforms the judicial role under the statute to one informed exclusively by Rule 26, Fed. R. Civ. P.," Petition at 19, the decision actually does nothing of the sort. It merely held that the district court, in this case, had considered improper factors in denying Malev's application. Contrary to Pratt's implication, the Court of Appeals did not limit the discretionary nature of a district court's § 1782 determination. The Court of Appeals merely outlined the powers available to the trial court "to lessen significantly" the burden of handling discovery, while acting within the requirements of § 1782.[15] Pet. App. 10a. In its reference to Rule 26, the Court of Appeals both protected the "twin aims" of § 1782 and prudently addressed the administrative concerns of the district court.

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14. As the Court of Appeals correctly recognized, district courts may correct any perceived imbalance in discovery. Pet. App. 11a. *See* 28 U.S.C. § 1782(a) (providing that a court may prescribe the discovery procedure to be followed, which may be, in whole or in part, the discovery practice and procedure of the foreign country).

15. The legislative history and the text of § 1782 expressly provide that the court, in supervising discovery, may follow "the foreign or international practice" or "the appropriate provisions of the Federal Rules of Civil Procedure." 1964 U.S.C.C.A.N. 3789; 28 U.S.C. § 1728(a).

The argument that the Court of Appeals' decision will burden United States courts beyond the contemplation of the statute is legally and factually unsupported. Any such increased involvement would constitute the plainly foreseeable result of the statutory scheme. As the Court of Appeals held, "[w]e are not at liberty to second-guess the policy choices of our Congress." Pet. App. 7a. Moreover, as the Court of Appeals' decision recognized, the statute itself provides ample mechanisms for the trial court to "achieve [the statute's] objective of minimizing the burdens involved with supervising . . . discovery . . . while acting within the confines of 28 U.S.C. § 1782.[16] Pet. App. 10a-11a.

Pratt's concerns that American nationals will be "penalized" by the Court of Appeals' decision is unwarranted. The statute is not intended to reach Americans only; nationals of all countries "resid[ing] or . . . found" in the United States or holding documentary evidence in this country are subject to § 1782. 28 U.S.C. § 1782. Even if a party to an international litigation — whether American or foreign — is granted discovery pursuant to § 1782 because its opponent has evidence located in the United States, the district court has ample authority, under the statute and the Federal Rules, to protect all parties from perceived discovery abuses.

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16. For example, the trial court may limit the scope and method of discovery under Fed. R. Civ. P. 26; it may appoint a magistrate or other person to supervise the discovery and administer oaths; and it may otherwise prescribe the practice and procedure for discovery. 28 U.S.C. § 1782.

II.

THE WRIT SHOULD BE DENIED BECAUSE THIS CASE DOES NOT CONFLICT WITH ANY OTHER DECISION OF A UNITED STATES COURT OF APPEALS.

Pratt argues that the Court of Appeals' decision failed "to reconcile" its ruling with certain decisions of the Third and Eleventh Circuits.[17] Petition at 17. Pratt's attempt to present a conflict between the Court of Appeals' decision and decisions of other circuit courts of appeals not only misinterprets the decision in this case, but ignores the factual record presented by Pratt's Petition. The entire premise of Pratt's argument in this regard is fatally flawed — the Court of Appeals' decision does not require district courts "to supplant the rules of foreign tribunals by granting American-style discovery under section 1782 even where such procedures are unavailable or offensive to the foreign tribunal in charge of the case." Petition at 16. Indeed, this issue was not even discussed by the Court of Appeals since, as Pratt concedes, and the district court held, discovery is available in the Hungarian court. Petition at 5, 12.

Pratt contends that the Third Circuit's opinion in *John Deere, Ltd.*, 754 F.2d 132, and the Eleventh Circuit's opinion in *Lo Ka Chun*, 858 F.2d 1564, are at odds with the Court of Appeals' decision here. According to Pratt, both of the cited cases stand for the principle "that section 1782 does not permit a foreign litigant to make an 'end run' around the rules of foreign tribunals that restrict discovery." Petition at 17. Nothing in the Court of Appeals' decision here contradicts the principle. Indeed, because the Hungarian court's authority to grant discovery was not at issue, the

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17. A supposed failure "to reconcile" is, on its face, not a basis to grant the petition. *See* Sup. Ct. R. 10.1(a) (noting that the existence of *conflicting* rulings by different circuit courts on the same matter may constitute a basis to grant a petition for certiorari).

Court of Appeals was not invited to address the propriety of granting a § 1782 application where the rules of the foreign tribunal restrict discovery. Thus, the Court of Appeals' decision cannot plausibly be interpreted as conflicting in any manner with *John Deere Ltd.* and *Lo Ka Chun.*

The Court of Appeals' opinion also cannot be read, as Pratt contends, as sanctioning an "end run" around the foreign tribunal's authority. Indeed, that no such strategy was even attempted here is clear. Malev informed the Hungarian court of its § 1782 application and the Hungarian court was obviously not troubled by the United States court's involvement. It expressly held, after Malev advised the court of its application, that "[t]he means used [by Malev] to obtain disclosure and to marshal evidence . . . is exclusively up to that party." C.A. App. A-206-207. Moreover, even absent such approval by the Hungarian court, § 1782 provides that an application may be made by any "interested person," a provision which authorizes the district court to review an application regardless of whether the foreign court authorized discovery in the United States court.[18] 28 U.S.C. § 1782.

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18. The unambiguous text of the statute does not even hint at the limitation which Pratt invites this Court to adopt —that "[s]ection 1782 was not intended to create a presumption that United States discovery is available in favor of one party to a foreign proceeding against its adversary." Petition at 17 n. 9. This is fatal to Pratt's contention. *See American Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982)(statute should be interpreted according to plain and unambiguous text); *Caminetti v. United States,* 242 U.S. 470, 485 (1917)(same). Further, the Senate Report accompanying the provision which enacted § 1782 expressly states that an "interested person" under the statute includes "a *party* to foreign or international litigation." 1964 U.S.C.C.A.N. 3789 (emphasis added).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: July 31, 1992

Respectfully submitted,

ROBERT C. BATA
Counsel of Record
ELIZABETH A. MULLINS
KENNETH PASQUALE
Stroock & Stroock & Lavan
7 Hanover Square
New York, New York 10004
(212) 806-5400

BARRY H. GARFINKEL
MARCO E. SCHNABL
Skadden Arps Slate Meagher & Flom
919 Third Avenue
New York, New York 10022
(212) 735-3000

Attorneys for Respondent Malev Hungarian Airlines

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED JUNE 26, 1992

UNITED STATES COURT OF APPEALS
FCR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of June one thousand nine hundred and ninety-two.

DOCKET NUMBER: 91-7949

In the Matter of the Application of
MALEV HUNGARIAN AIRLINES,

Plaintiff.

MALEV HUNGARIAN AIRLINES,

Plaintiff-Appellant,

V.

UNITED TECHNOLOGIES INTERNATIONAL INCORPORATED; PRATT & WHITNEY COMMERCIAL ENGINE BUSINESS,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellees, United Technologies International Incorporated and Pratt & Whitney Commercial Engine Business.

Upon consideration by the panel that decided the appeal, it is

Appendix A

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH,
Clerk